**REPLY APPENDIX A**

No. 04-105

IN THE SUPREME COURT OF THE UNITED STATES

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UNITED STATES OF AMERICA, PETITIONER

v.

DUNCAN FANFAN, RESPONDENT

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**ON PETITION FOR A WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT**

**PETITION FOR A WRIT OF CERTIORARI BEFORE JUDGMENT**

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## QUESTIONS PRESENTED

1. Whether the Sixth Amendment is violated by the imposition of an enhanced sentence under the United States Sentencing Guidelines based on the sentencing judge's determination of a fact (other than a prior conviction) that was not found by the jury or admitted by the defendant.

2. If the answer to the first question is "yes," the following question is presented: Whether, in a case in which the Guidelines would require the court to find a sentence-enhancing fact, the Sentencing Guidelines as a whole would be inapplicable, as a matter of severability analysis, such that the sentencing court must exercise its discretion to sentence the defendant within the maximum and minimum set by statute for the offense of conviction.

. . .

The government is today filing petitions for certiorari in this case and in *Booker*, *supra*, as companion vehicles for this Court's consideration of the implications of *Blakely* for federal sentencing. Further review is warranted in both cases, on an expedited basis, in order to provide authoritative answers to the questions presented and to provide guidance on how to conduct the thousands of federal criminal sentencings that are scheduled each month.

### A. Review Of The Implications Of *Blakely* For Federal Criminal Justice Is Warranted

The government's petition for certiorari in *Booker* recounts in detail the conflict in the circuits that has arisen on whether *Blakely* applies to the Guidelines. Booker Pet. 11-14. It also explains the importance of the second question presented in both cases: i.e., the issue of how, if the rule in *Blakely* applies to the federal Sentencing Guidelines, sentencing is to be conducted in federal cases in which *Blakely*'s interpretation of the Sixth Amendment invalidates application of certain Guidelines provisions. Booker Pet. 14-19....

**B. This Case Squarely Presents The Issues Surrounding The *Blakely* Controversy On Which This Court's Guidance Is Needed**

This case squarely raises both of the issues presented. The district court determined that *Blakely* applies to the Guidelines. It then imposed sentence based on its conclusion that the Guidelines as a whole could continue to govern federal sentencing, although in a truncated fashion and not in their intended manner. App., *infra*, 1a-13a. The court thus refused to apply Guidelines enhancements for drug quantity and respondent's role in the offense because, the court held, to do so "would unconstitutionally impinge upon [respondent's] Sixth Amendment right to a jury trial as explained by *Blakely*." *Id.* at 11a. On that basis, the court sentenced respondent to 78 months of imprisonment (from a 63-78 month sentencing range), rather than sentencing respondent within the 188-235 months range that it concluded the Guidelines would otherwise require. Id. at 7a. The case thus squarely presents both the question whether federal sentencing practice is unconstitutional under *Blakely* and, if so, how sentencing should be conducted.

**C. Certiorari Should Be Granted Both Here And In *United States v. Booker***

In *Booker*, *supra*, the Seventh Circuit held that *Blakely* applies to the Guidelines and precludes their normal operation in cases in which judicial factfinding would increase the defendant's maximum sentence under the Guidelines. Booker Pet. App. 8a-9a. The court then remanded the question of severability and other remedial issues to the district court. Id. at 13a. The government's petition for certiorari in *Booker* presents the same questions that are presented here. Because the petition in *Booker* seeks review of a decision of a court of appeals, it offers the opportunity for review of the issues through the Court's customary certiorari procedure.

In this case, unlike *Booker*, the court of appeals has not yet reviewed the judgment. But this case has the advantage of arising from a decision in which the sentencing court resolved

both questions presented in the petition. This case thus provides an appropriate companion to *Booker* for this Court to consider, in a concrete context, the implications of *Blakely* for federal sentencing.

Simultaneous grants of review here and in *Booker* are warranted. Granting certiorari in both cases would protect against any possibility that later impediments to review in one or the other case might prevent timely resolution of the issues. Assurance that the Court will have a vehicle in which to reach and resolve the important issues presented, and thereby reduce or eliminate the uncertainty that is currently ravaging the federal sentencing system, is warranted in light of what one court has called "an impending crisis in the administration of criminal justice in the federal courts." *United States* v. *Penaranda*, 2004 WL 1551369, at *7 (2d Cir. July 12, 2004) (en banc), certification docketed, No. 04-59 (July 13, 2004).

**D. A Grant Of Certiorari Before Judgment And Expedited Consideration Is Warranted In The Exceptional Circumstances Of This Case**

1. A petition for a writ of certiorari before judgment in a case pending in a court of appeals will be granted "only upon a showing that the case is of such imperative public importance as to justify the deviation from normal appellate practice and to require immediate settlement in this Court." Sup. Ct. R. 11. This case satisfies that strict criterion.

On several occasions, this Court has granted certiorari before judgment when necessary to obtain expeditious resolution of exceptionally important legal questions. Most notably, the Court granted certiorari before judgment in Mistretta v. United States, 488 U.S. 361, 396 (1989), in which, as in this case, the constitutionality of the federal sentencing scheme was at issue. The Court also granted certiorari before judgment in *Gratz v. Bollinger*, 539 U.S. 244, 259-260 (2001); *Dames & Moore v. Regan*, 453 U.S. 654 (1981) (Iran hostage agreement); *United States v. Nixon*, 418 U.S. 683 (1974) (subpoena to the President); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (steel seizure case); and *Ex parte*

*Quirin*, 317 U.S. 1 (1942) (President's assignment to a military tribunal of jurisdiction over the trial of belligerent saboteurs).

[footnote] See *Barefoot* v. *Estelle*, 463 U.S. 880 (1982) (certiorari before judgment to decide standards governing stay of execution pending litigation of habeas petition); *Clark* v. *Roemer*, 501 U.S. 1246 (1991) (granting certiorari before judgment and summarily vacating and remanding case for further consideration in light of intervening Supreme Court decision). In addition to Gratz, the Court has granted certiorari before judgment in other cases where cases presenting similar issues had already been accepted for review. *See, e.g.*, *Taylor* v. *McElroy*, 358 U.S. 918 (1958); *Boiling* v. *Sharpe*, 344 U.S. 873 (1952); *Porter* v. *Dicken*, 328 U.S. 252, 254 (1946).

See generally James Lindgren & William R. Marshall, *The Supreme Court's Extraordinary Power to Grant Certiorari Before Judgment in the Court of Appeals*, 1986 Sup. Ct. Rev. 259. The constitutionality of federal sentencing practice in light of *Blakely* concerns a subject of equal national importance and warrants certiorari before judgment in this case....

## REPLY APPENDIX B

No. 02-516

IN THE SUPREME COURT OF THE UNITED STATES

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JENNIFER GRATZ AND PATRICK HAMACHER, PETITIONERS

v.

LEE BOLLINGER, JAMES J. DUDERSTADT, AND THE BOARD OF REGENTS OF THE UNIVERSITY OF MICHIGAN, RESPONDENTS

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**ON PETITION FOR WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT**

**PETITION FOR WRIT OF CERTIORARI**

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## QUESTIONS PRESENTED

1. Does the University of Michigan's use of racial preferences in undergraduate admissions violate the Equal Protection Clause of the Fourteenth Amendment, Title VI of the Civil Rights Act of 1964 (42 U.S.C. § 2000d), or 42 U.S.C. § 1981?

2. Did the district court correctly dismiss the plaintiff class's claim for injunctive relief with respect to the University of Michigan's use of racial preferences in undergraduate admissions?

3. Did the individual defendants violate the clearly established legal rights of plaintiffs, so that they are not entitled to summary judgment on the ground of qualified immunity?

. . . .

## REASONS FOR GRANTING THE WRIT

### I. THIS COURT SHOULD EXERCISE ITS POWER TO GRANT REVIEW BEFORE JUDGMENT

Rule 11 of this Court's rules provide that a writ of certiorari before judgment in a case pending in a court of appeals will be granted "only upon a showing that the case is of such imperative public importance as to justify the deviation from normal appellate practice and to require immediate settlement in this Court." For several reasons, the circumstances of this case make it appropriate for granting such early review.

First, the case presents issues of fundamental national importance. *See* discussion *infra* at 24-30. It concerns important constitutional and civil rights, and the resolution of these issues will almost certainly have effects that extend far beyond the parties to the case.

Second, this Court has before it a petition for certiorari filed on August 9, 2002, in *Grutter v. Bollinger*, which seeks review of a decision by the same court of appeals in which this case is pending, which involves many of the same parties, and which presents issues that are in many respects identical or very similar to those raised in this case.

[footnote] The Board of Regents of the University of Michigan and Lee Bollinger, formerly president of the University and prior to that dean of its law school, are defendants in both the *Grate* [sic] and *Grutter* cases.

There are, however, also differences between the two cases. Among other things, a comparison of the cases shows how racial preferences can take different forms, while inflicting the same kinds of harm. While each case itself is separately worthy of this Court's review, the two cases considered together will present the Court with a broader spectrum and more substantial record within which to consider and rule upon the common principles that they involve than if only one case is considered, or if they are resolved separately and at different times or in different terms. In a number of cases, this Court has found it appropriate to grant review before judgment when another similar case has already been accepted for review by the Court. For example, in considering a petition for certiorari in *Brown v. Board of Education*, 344 U.S. 1, 3 (1952), the Court took judicial notice of a similar case pending in the court of appeals and invited the filing of a petition for review in that case, *id.* at 3, which was subsequently granted, see *Boiling v. Sharpe*, 344 U.S. 873 (1952). See also *Taylor v. McElroy*, 358 U.S. 918 (1958) (certiorari granted before judgment "because of the pendency here" of another case, *Greene v. McElroy*, 360 U.S. 474 (1959), which involved the same important constitutional issues and which was pending in the same court

of appeals); *Porter v. Dicken*, 328 U.S. 252, 254 (1946) (certiorari granted before judgment "by reason of the close relationship of the important question raised to the question presented" in a case for which the Court had already granted certiorari, *Porter v. Lee*, 328 U.S. 246 (1946)).

Third, the absence of a decision from the Sixth Circuit in this case should make no difference on the common principal issues related to compelling-interest and narrow-tailoring analyses raised by the two cases. The Sixth Circuit decided the first issue as a matter of law in *Grutter v. Bellinger*, 288 F.3d at 738-44 (holding diversity to be a compelling interest). Presumably, in eventually deciding this case, the Sixth Circuit would follow its own recent precedent as to those issues. Accordingly, this Court already has for evaluation the reasoning of the Sixth Circuit on compelling-interest analysis. As to narrow-tailoring, the Sixth Circuit has also already laid out its analytical approach to the issue. *Id.* at 744-52.

The sharp division in the lower courts (*see* discussion *infra* at 20-24) has itself created circumstances whereby the various competing arguments on compelling interest and narrow tailoring have been fully developed. These considerations, plus the circumstance that the district court decided the case on summary judgment, subjecting it to de novo review by this Court and the Sixth Circuit, militate against waiting for a decision from the Sixth Circuit. This is particularly true given the benefits of having the cases considered together.

Fourth, the effect on members of the class caused by the Sixth Circuit's delay is also a consideration that weighs in favor of granting review at this time. Because the University starts making admissions decisions in the fall for the class to be enrolled in the following fall, inaction by the Sixth Circuit has already meant that many members of the class now applying for admission will compete for scarce admissions spots under a race-based dual system. Although it is unknown when the Sixth Circuit would eventually render a decision in this case, the delay that has already occurred - nearly ten months since the case was argued and over nineteen months since the appeal was filed - is incompatible with the time-sensitive nature of the

admissions process (and with the Sixth Circuit's ruling (*see* discussion *supra* at 13 & n.2) that the appeal would be expedited). See *Aaron v. Cooper*, 357 U.S. 566, 567 (1958) (denying petition for review before judgment in school admissions case where belief expressed that court of appeals would "recognize the vital importance of the time element in this litigation" and would act "in ample time to permit arrangements to be made for the next school year"). *Cf. United States v. Clinton*, 524 U.S. 912 (1998) (denying petition for review before judgment while noting that "[i]t is assumed the Court of Appeals will proceed expeditiously to decide this case").

Finally, granting review at this time will not deny the Court the time to reflect adequately on the important issues at stake. The petition has been filed in time to permit, if it is granted, briefing on the merits in the normal course and consideration by this Court during the 2002 term. Moreover, if the Court grants review in *Grutter v. Bollinger*, the two cases could, at the Court's direction, be briefed on the merits under a simultaneous schedule, argued on the same day, and decided during the same term.

Although this Court rarely exercises its power to grant review before judgment, this is one of the rare cases where the Court should grant the petition before judgment.

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